In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1570

ROBERT H. DONNELLY,
PETITIONER,

v.

BENJAMIN A. DECHRISTOFORO,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

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Opinions Below

The opinion of the Court of Appeals is reported at 473 F.2d 1236 (A. 236).* The order of the district court (A. 231) is not reported. The Memorandum of the United States Magistrate appears at A. 136. The opinion of the Massachusetts Supreme Judicial Court (A. 149) is reported

* "A" refers to Appendix.

at 1971 Mass. Adv. Sh. 1707, 277 N.E.2d 700 (1971).

Jurisdiction

The judgment of the court below was entered on February 22, 1973. The petition for a writ of certiorari was filed on May 23, 1973 and was granted on October 13, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Question Presented

Whether the lower court erred in concluding that the statements made by the prosecutor in his closing argument were so seriously prejudicial as to deny the respondent his rights under the Fourteenth Amendment to the Constitution?

Constitutional Provisions

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Proceedings in the State Courts

On May 8, 1967, a Middlesex County grand jury returned two indictments against the respondent. Indictment No. 77689 accused the respondent in the language of the statute with having committed murder in the first degree on April 18, 1967, in Medford, Massachusetts, of one Joseph Lanzi.[1] Indictment No. 77690 accused the appellant in two identical counts of unlawfully carrying "under his control in a vehicle a firearm . . . without authority and permission so to do." (A. 10-12)

Also on May 8, 1967, the same grand jury returned separate identical indictments against one Frank Oreto and one Carmen Gagliardi. (See A. 93, 98, 150.)

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[1] In response to a Bill of Particulars seeking "the manner in and the means by which the defendant did assault and beat the said Joseph F. Lanzi and the manner in and the means by which the defendant did allegedly kill and murder the said Joseph F. Lanzi, the Commonwealth responded, "The Commonwealth alleges that the defendant alone or in joint concert with others fired four bullets into the body of Joseph F. Lanzi," and further stated "the Commonwealth alleges that the defendant in joint concert with others fired four bullets into the body of Joseph F. Lanzi." In accordance with established procedure in the Commonwealth of Massachusetts these Particulars were read to the jury. (A. 3; Tr. 236)**

**Tr. refers to State Trial Transcript.

Prior to the respondent's arraignment, Oreto was brought to trial before Judge Sullivan and on October 26, 1967, pleaded guilty to so much of the indictment as alleged murder in the second degree, and to the gun charges. These changes of pleas were accepted by Judge Sullivan who imposed a life sentence on the murder charge and concurrent sentences of three to five years in State prison on the gun charges. (A. 93.)

At DeChristoforo's arraignment on November 20, 1968, pleas of not guilty were entered.

Over his objections the respondent was tried jointly with Gagliardi. (A. 2-4, 163.)

Trial commenced on April 22, 1969, and the Commonwealth, conceding that it was Gagliardi and Oreto who fired the actual shots,[2] relied on circumstantial evidence to connect DeChristoforo in a joint venture with them to kill Lanzi. The Commonwealth relied substantially upon the testimony of Officer Carr who testified that the respondent had made certain false and incriminating statements. (A. 150, 187, 188, 191, 194.) There was also evidence of flight by the respondent, which he sought to prove was indicative of fear for his life and not consciousness of guilt. (Tr. 804, 805.)

At the trial there was evidence that on April 18, 1968, the respondent was 31 years of age, married, a resident of Stoneham, Mass., and was employed as the manager of the Attic Lounge, a night club in Boston. (A. 90, 66, Tr. 724.) Prior thereto he had been a page boy for the Senate of the Commonwealth of Massachusetts for seven or eight years. There was uncontradicted testimony that he had enjoyed a reputation for honesty and for being a non-violent person, both in the community where he lived and

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[2] It was not until his closing argument to the jury that the Assistant District Attorney so conceded. See fn. 3.

in the State House where he worked, and for many years had been a close personal friend of the deceased Joseph Lanzi. (A. 86-93.)

At about 5:45 P.M. on the evening of April 17, 1967, the respondent was at work at the Attic Lounge and at about 2:15 A.M. on the morning of April 18, the bartender, one Dello Russo, left the premises. At that time, the respondent, in the performance of his functions as manager, was engaged in his usual practice of closing the club and clearing it of any late customers. Frank Oreto was standing at the bar. Gagliardi was also on the premises. It was raining very hard at the time that Dello Russo left the premises at about 2:15 A.M. or 2:30 A.M. (A. 66-69.)

On April 18, 1967, at about 3:55 A.M. Patrick J. Carr, a City of Medford police officer, was operating a police cruiser on Middlesex Avenue, Medford. In the car with him was Officer John P. Brady. It was raining heavily. (A. 13, 16.)

They saw a red colored Ford, in which there were four young men, approaching from the opposite direction at a speed between 20 and 30 miles per hour. The Ford made a turn slowing down to between 15 and 20 miles an hour. Because of their youth and the early hour, Officer Carr's suspicions were aroused. He turned the police car around and trailed the Ford until it stopped in front of a house at 6 Fifth Street. Officer Carr stopped the cruiser alongside, but a little beyond, the Ford. Both he and Officer Brady alighted from the cruiser and as they did, the operator of the Ford stepped out onto the sidewalk. Both police officers knew him as Carmen Gagliardi. (A. 14-18, 25, 26.) Officer Carr asked Gagliardi what was going on and who owned the car. Gagliardi replied that he was going into his house and that the car was a rented automobile. He backed away from the Officers, keeping both of his hands in his pockets, and headed in the direction of

a house at 9 Fifth Street. At the curbing, he turned and walked up the stairs of that house and opened the front storm-door. At the time, both Officers knew that Gagliardi lived in the area but did not know in which house. They later learned that Gagliardi actually lived in the house at 11 Fifth Street. (A. 17, 19, 24, 25, 51, 52.)

The respondent was seated behind the driver's seat to the extreme left of the back seat. Oreto was seated behind the deceased Joseph Lanzi who appeared to the police officers to be asleep on the right hand side of the front seat. (A. 26, 17.)

On direct examination Officer Carr testified that he asked both of the men in the back seat of the car to get out, which they did. Both men got out of the car from the right rear door, Oreto first and then the respondent. (A. 18.) Oreto was wearing a pair of black kidskin gloves. (A. 56.)

Officer Brady testified that he couldn't recall as to whether he had seen the appellant's hands when the respondent came out of the Ford, but testified that he does not "suggest that he (respondent) might have been wearing gloves." (A. 60.)

Officer Carr testified that he asked both men for identification and each said that he had none. He then asked them to identify themselves. Oreto stated that his name was Joseph Rigo from Boston. The respondent gave a name, which neither officer remembered, but, according to Carr's testimony it was not the name "DeChristoforo." (A. 19.)

Officer Carr testified that he asked who the man in the front seat was and that it was the respondent who replied that the man's name was Johnny Simeone and that he, Simeone, had been involved in a fight in Revere, but he would be all right and that they were going to take him to a hospital. (A. 20.) Before the officers' suspicions were fully aroused, respondent was permitted to leave the scene. (A. 55, 56.)

Officer Carr and his partner then walked to the other side of the car and stepped onto the sidewalk. He flashed his light into the rear of the car and saw a small (fully loaded) derringer on the floor of the car behind the driver's seat. He then moved the light around and saw a Smith and Wesson revolver on the rear seat at the place where Oreto had been sitting. He opened the car door, removed both guns and asked Oreto whether either of those guns belonged to him. Oreto answered in the negative. Officer Carr took the guns, placed them in the cruiser and then returned to the Ford. He opened the driver's door of the car and examined Lanzi. Lanzi was dead, having been shot four times. It was subsequently discovered there were no fingerprints on the derringer. (A. 20, 21, 36, 84.)

Lanzi had died in the car sometime between 3:00 and 4:00 A.M. as the result of a head wound inflicted by the Smith & Wesson revolver and chest wounds inflicted by a Harrington & Richardson revolver afterwards discovered in the vicinity of where the car had been stopped. (A. 38, 39, 62.)[3]

On cross-examination, counsel for appellant showed, by means of a transcript at the probable cause hearing held to determine whether Oreto should be held for Lanzi's murder, that Officer Carr had testified under oath that it was Oreto who had made certain of the false, incriminating statements he attributed to DeChristoforo at trial. (A. 27-30.) In addition, it was shown that in his hand-written police report Officer Carr stated that he first examined the deceased *after* DeChristoforo had left, whereas Officer Carr's testimony was to the effect that his examination

[3] The Commonwealth during closing argument conceded that DeChristoforo had not fired any shots into the body of Lanzi and further conceded that it was Gagliardi, who shot three bullets into Lanzi's side, and that it was Oreto who shot the bullet into Lanzi's head. (A. 123.)

of the deceased had prompted his questioning of DeChristoforo resulting in the aforementioned false and incriminating statements. (A. 30-32.)

There was further evidence that after DeChristoforo had left the scene, the officers discovered that Lanzi was dead and they then arrested Frank Oreto. (A. 21.)

After the return of the indictments charging him with first degree murder and illegal possession of firearms, an FBI warrant for unlawful flight was lodged against the respondent in April of 1967. He was apprehended by the FBI in November of 1968 at his grandmother's house where he had been living continuously since the incident.[4]

After the close of all of the evidence, respondent's co-defendant, Gagliardi, offered to plead guilty to murder in the second degree, and the plea was accepted, in the absence of the jury. Trial then resumed with DeChristoforo as the only defendant present. When the jury returned, the court stated: "Mr. Foreman, and gentlemen of the jury, you have noted that the defendant Gagliardi is not in the dock. He has pleaded guilty and his case has been disposed of. We will, therefore, go forward with the trial of the case of the Commonwealth v. DeChrostoforo . . .".

No instructions were given to the jury to the effect that Gagliardi's plea should not be considered in deciding the guilt or innocence of DeChristoforo.[5] (A. 98, 99.)

During the course of the prosecutor's closing argument to the jury he made a substantial number of statements which the Supreme Judicial Court has held to be "clearly improper." *Commonwealth* v. *DeChristoforo* 1971 Mass.

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[4] At trial the respondent sought to introduce evidence to show that he was living at his grandmother's house out of fear for his life and not to evade prosecution. The proffered evidence was excluded. (Tr. 804, 805.)

[5] No such instruction was requested.

Adv. Sh. 1707, 1711-1712, 277 N.E. 2d 100, 105. (A. 164.)[6]

The prosecutor opened his summation by stating: "Let me preface my argument by saying first of all I am aware what I say really is an argument because the word 'argument' presupposes that I am prejudiced to the case that I represent, which of course I am. I think that the very nature of this system being adversary, pitting one side against the other, naturally makes you point to those things which you think support your particular position and to more or less ignore those things which I suppose detract from it." (A. 119.)

Building upon this concept of his duty as a prosecutor,[7] he stated, by way of pointing out the duty and obligation of the jury: "And we have a sworn responsibility, it seems to me, to sit here in this courtroom now and say to ourselves: '*We are faced here in our judgment with one of the most savage killings that any jury could ever see anywhere under any circumstances.*' " (A. 121.) (Emphasis supplied.)

Continuing, the prosecutor represented to the jury: "I think the whole thrust of the government's case was that Gagliardi shot him three times here, and Oreto shot him in the back of the head, and our friend, DeChristoforo,

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[6] Even Circuit Judge Campbell in his dissenting opinion said: "While the remarks made *were improper* and might warrant reversal in the exercise of our supervisory powers, were this case to be before us upon appeal from a federal district court, I am unable to agree, especially when read in the context of the prosecutor's extended arguments, that they were either so meaningful or prejudicial as to amount to error of constitutional proportions." (A. 243.) (Emphasis added)

[7] Contrariwise, *American Bar Association Canons of Professional Ethics* No. 5 (1968) provided that the primary duty of a prosecutor is "not to convict but to see that justice is done." As a corollary to this, it would seem that his adversary posture should be rational discourse and not inflammatory rhetoric. See also *American Bar Association Standards Relating To The Prosecution Function*, 5.8.

had a cocked Rohm derringer ready to administer another shot if that became necessary." (A. 123.)

In pointing out to the jury that the respondent was asking the jury to find that he was in the automobile for the purposes of being given a ride home to Stoneham, the prosecutor went on to argue, "... so at that point we have to conclude that Frank Oreto, I suppose was carrying two guns, or Gagliardi was carrying two guns. *You and I know that's a myth.*" (A. 124.) (Emphasis supplied.)

He continued: "The inference I want you to draw is: These people are clever enough—is that they don't have guns that can ever be traced to them. *You know that and I know that.*" (A. 127.) (Emphasis supplied.)

Continuing to express his personal belief in the guilt of the respondent, the prosecutor stated to the jury: "*I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way ...*". (A. 130, 131.) (Emphasis supplied.)

Moreover, in the context of the jury just having been informed of Gagliardi's plea of guilty, the prosecutor continued his expressions of personal belief and knowledge. He stated to the jury: "I don't know what they want you to do by way of a verdict. They said that they hoped that you find him not guilty. *I quite frankly think that they hope you find him guilty of something a little less than first degree murder.*"[8] (A. 129.) (Emphasis supplied.)

Counsel for the respondent immediately voiced his objection. The following colloquy took place:

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[8] The respondent at no time sought to plead guilty to any offense. In the Court of Appeals the parties stipulated: "It is stipulated that at no time did defendant seek to plead guilty to any offense; at no time did the Commonwealth seek to solicit or offer to accept a plea; and at all times defendant insisted upon a trial." (A. 235.)

"Mr. Smith: I object to that.
"The Court: I don't think—
"Mr. Smith: That's not fair argument.
"The Court: No.
"Mr. Smith: That isn't so."[9] (A. 129.)

At the close of the prosecutor's argument and before the trial court's charge to the jury, counsel for the respondent moved for a mistrial on the grounds that the prosecutor's argument to the jury had been "so prejudicial and so unfair that it cannot be cured by instructions to the jury." (A. 132.) To the denial of the respondent's motion for a mistrial, the respondent duly excepted. (A. 134.)

Thereupon, counsel for the respondent requested the trial court to "forcefully and specifically instruct the jury that the statements made by Mr. Irwin (the prosecutor) in his closing argument to the effect that the defendant was not really seeking a not guilty" was improper argument and that "from the beginning of the trial up to this point, the defendant has maintained his complete innocence and in no way has indicated that he is willing or that he is seeking to have the jury find him guilty of a lesser offense." The court suggested that the request be reduced to writing so that the court could then "file it with the papers." (A. 135.)

Counsel for the respondent then wrote out and filed the following specific request for instructions:

> "In his closing argument to you, members of the jury, Mr. Irwin, the assistant district attorney, stated with reference to the defense:

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[9] Later, the Judge said that he did tell the jury at the time "No. This is improper argument." (A. 133.) At any event, if the Court Stenographer didn't hear the Judge's statement, it is reasonable to assume that the jury did not. Moreover, this was not the only time that the Judge in overruling an objection simply said "No." (See Tr. 588.)

> 'I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope you find him guilty of something a little less than first-degree murder.'

"(a) That statement was improper argument. There is no basis for that statement. The defendant has consistently maintained his innocence by virtue of his plea of not guilty as to any and all charges or accusations made against him.

"(b) As far as you are concerned the defendant is still presumed to be innocent of any and all charges before you.

"(c) You are to totally and completely eliminate from your minds any such suggestion or argument made by Mr. Erwin (sic), insofar as that is humanly possible and if you find that you cannot eliminate that from your consideration of the case then you are to inform the foreman of the fact.

"(d) I ask you now whether there is anyone on the jury who feels he cannot eliminate that from his deliberations and from his consideration of his decision in this case.

"(e) I again instruct you that you are to disregard that statements made by Mr. Erwin (sic) and consider this case as though no such statement was made." (A. 145, 146.)

Instead of granting the specific request the judge, during his final charge, instructed the jury:

> "Now in his closing, the District Attorney, I noted, made a statement: 'I don't know what they want you to do by way of a verdict. They said they hope that

you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder.' There is no evidence of that whatsoever, of course, you are instructed to disregard that statement made by the District Attorney. Consider the case as though no such statement was made.

"And the same instructions, of course, apply to any statements in argument which were made by Mr. Smith on behalf of the defendant, if any, you feel there be, statements which he made in his argument which were not supported by the evidence which you heard here during the trial of the cause. In short, the opening statement of counsel or the arguments of counsel at the conclusion of the case are not evidence for your consideration."[10] (A. 143, 144.)

On April 30, 1969, the jury returned a verdict of guilty of murder in the first degree with a recommendation that the death penalty not be imposed. Respondent was given a life sentence on that indictment.[11] (A. 6.) The jury also returned a verdict of guilty on the indictment charging him with unlawfully carrying two firearms and he was sentenced thereon to a concurrent 4-5 year term. (Tr. 1037.)

The respondent seasonably filed his claim of appeal to the Massachusetts Supreme Judicial Court raising the

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[10] See fn. 19 *infra.*

[11] Oreto and Gagliardi, whom the Commonwealth conceded were the ones who did the actual shooting, were, upon their pleas of guilty to second degree murder, given life sentences which under Massachusetts law permits consideration of their parole in 15 years as distinguished from respondent's sentence which does not permit him to be considered for parole. Mass. Gen. Laws (Ter. Ed.) c. 127, s. 133A.

issues raised by the petition herein.

In addition the respondent filed a motion for a new trial again claiming that he had been denied his constitutional right to a fair trial on the same grounds as those set forth in the petition herein.[12] To the denial of that motion the respondent duly excepted and that exception became part of the record on appeal to the Supreme Judicial Court. (A. 146, 147.)

The respondent duly prosecuted his appeal from his convictions to the Supreme Judicial Court of Massachusetts in accordance with Mass. G.L. (Ter. Ed.) c. 278, ss. 33A-33G, as amended. The judgment of the Superior Court was affirmed by a majority of the Massachusetts Supreme Judicial Court over the strong dissents of Chief Justice Tauro and Mr. Justice Spiegel. *Commonwealth* v. *DeChristoforo*, 1971 Mass. Adv. Shts. 1707, 1718-1730, 277 N.E. 2d 100, 109-115. (A. 149-176.)

Because the petitioner has made certain misstatements in his brief at page 6 dealing with statements purportedly

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[12] "The motion, as amended, some 6½ months after it was originally filed, was based on allegedly newly discovered evidence outlined in four affidavits. Three of these were to the effect that the defendant was in the car on the night of the murder because Gagliardi had offered him a ride home from 'The Attic'. One of the three, by the defendant's father, also contained an account of an incident which would suggest that the derringer found in the back of the car belonged to Lanzi. That affidavit asserted also that defence witnesses who were to be called to testify to the substance of the affidavits were prevented from testifying at trial by a threatening telephone call made to the defendant's father during the trial. The fourth affidavit, by counsel for the defendant on behalf of a Medford police officer, stated the substance of a conversation with the defendant's father before the defendant was apprehended to the effect that the defendant was hiding only because he was frightened of Gagliardi.

If the evidence described in the affidavits had been offered at trial in admissible form and believed by the jury, this information might well have led to a different result. The opening statement for the defendant indicates that the defense did in fact intend to introduce such evidence." *Commonwealth* v. *DeChristoforo*, 71 Mass. Adv. Sh. 1707, 1716-17, 277 N.E. 2d 100, 107-8. (A. 159-160.)

made by counsel for the respondent during his opening to the jury, the respondent's counsel's opening is set forth in its entirety below:

Opening by Respondent's Counsel

"Mr. Smith: May it please the Court, Mr. Foreman and Madam Juror and gentlemen of the jury.

As Mr. Irwin has pointed out to you, an opening is not evidence, it is simply a statement of counsel as to what counsel intends or expects will be shown to you introduced into evidence in either the Government's case, when he made his opening or in the defense when I make my opening.

I represent Benjamin DeChristoforo. We intend to introduce evidence to establish that Mr. DeChristoforo, a young married man of good character, was employed at an establishment known as the Attic, as a manager. And that while so employed there his duties were to close up the place and see to it that no person bought liquor after hours.

That he lived out in Stoneham, and that his home was a matter of a five-minute ride or so from the area on Fifth Street in Medford where this automobile had come to a stop. That on the night in question, that it was a very rainy night, that he had no means of transportation, and that he was given a ride to go home. That in that vehicle was the deceased, Joseph Lanzi. There will be evidence of the relationship between Lanzi and DeChristoforo.

That after the incident developed, after the police arrived at the scene, he left the scene for reasons which will be explained or introduced to you; and that it was that the defendant intends to show it was (sic) because of any consciousness of guilt, but for

very valid reasons which we hope that this jury will understand and will consider in an atmosphere other than consciousness of guilt.

We expect to show to you that he then went to his grandmother's house, as a result of certain pressures, and stayed at his grandmother's house until the FBI arrested him.

We intend to introduce evidence to negate any consciousness of guilt on his part; and we intend to introduce evidence of good character, and evidence of the fact that he was not of a violent nature.

And with that, we expect to show to you Mr. Foreman and Madam Juror and gentlemen of the jury, this man was only a passenger in an automobile where an incident took place over which he had no control and had no interest in other than the death of his close friend, and that he did (sic) participate in any way in that killing." (Tr. 759-761.)

Notwithstanding the emphasis by the petitioner on page 6 of his brief alleging that respondent's counsel had stated in his opening "*that evidence would be offered* ...", a reading of the opening establishes that no such bold assertion was made.[13]

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[13] After cautioning the jury that counsel's remarks were not evidence, the strongest language used by respondent's counsel in his opening was "we intend to introduce evidence" and "we expect to show."

In fact, the record discloses that evidence was introduced that the respondent and Lanzi were close friends; that it was raining heavily; that Gagliardi, the operator of the automobile in which DeChristoforo had been a passenger, had been on the premises of the club in Boston as DeChristoforo was engaged in his usual practice of closing the club at or about 2:15 a.m.; that the respondent lived in Stoneham which is near the area where Gagliardi lived in Medford. (A. 14, 16, 17, 26, 66-70, 72, 87-93; Tr. 724.) Furthermore, the respondent did in fact offer to show that his flight to his grandmother's house was as a result of fear for his own life and not consciousness of guilt. That offer of proof was excluded by the trial court. (Tr. 803-806.), and see fn. 12.

Notwithstanding the emphasis in petitioner's brief at page 6, at no time in closing argument did defense counsel *assert — let alone reiterate — "his unsupported contentions that the respondent was in the car simply for the purpose of getting a ride home and that the respondent's flight was consistent with something other than consciousness of guilt."*

Rather, after pointing out the proximity between Medford and Stoneham, defense counsel argued that under the circumstances and based upon the evidence the jury "would have a right to draw the inference that all he was in there (the car) for was to get a ride home, because there is no evidence that he was in there for any other purpose." (A. 113.)

Proceedings in the Federal Courts

On July 7, 1972, respondent filed his petition for writ of habeas corpus in the United States District Court for the District of Massachusetts (A. 178). On August 28, 1972 the United States Magistrate filed his Memorandum (A. 186) which was "to the effect that the writ should be granted" (A. 197). After a hearing on September 5, 1972, (A. 177, 196), the District Court, on September 27, 1972, entered an Order Denying Petition For Writ of Habeas Corpus, ruling that "with respect to the first contention of the petitioner, the prosecutor's arguments were not so prejudicial as to deprive the petitioner of his constitutional right to a fair trial." (A. 231).

Upon appeal, the United States Court of Appeals for the First Circuit, on February 22, 1973, reversed the Order of the District Court, Circuit Judge Campbell dissenting. (A. 236). On remand to the District Court, prior to the filing of the petition for writ of certiorari herein, the respondent was admitted to bail by an Order entered on April 12, 1973.

Summary of the Argument

I

A. By asserting his personal belief in the guilt of the accused, by leading the jury to believe that there was evidence of the respondent's guilt known to the prosecutor but not introduced into evidence, by falsely stating to the jury that the respondent was seeking to have the jury find him guilty of something a little less than first degree murder which had the effect of falsely indicating to the jury that the respondent had offered to plead, and by appealing to the passions and prejudice of the jury, the prosecutor violated virtually all recognized standards for proper argument. (Pages 19-35).

B. The cumulative effect of the prosecutor's concededly improper and prejudicial remarks, particularly those statements which had the effect of suggesting to the jury that the respondent had offered to plead guilty to "something a little less than first degree murder," rendered the respondent's trial fundamentally unfair in violation of his Fourteenth Amendment right to due process. (Pages 35-37).

II

By stating to the jury that the respondent was hoping for a finding of guilty of "something a little less than first degree murder," a fact which he knew not to be true, the prosecutor invited the jury to conclude that the respondent had conceded his guilt. By conveying such a false impression, the prosecutor violated the respondent's constitutional right to due process. *Miller* v. *Pate,* 386 U.S. 1 (1967). (Pages 37-41).

III

Under the Sixth and Fourteenth Amendments the respondent was entitled to confront and cross examine all persons whose adverse statements, declarations, or testimony reached the jury. *Parker* v. *Gladden*, 385 U.S. 363 (1966). This right of cross-examination applied not only to testimony from the witness stand but also to statements by the prosecutor which may have had the effect of testimony. *Douglas* v. *Alabama*, 380 U.S. 415 (1965). By virtue of a number of improper remarks the prosecutor in effect testified against the respondent, in one instance giving deliberately false testimony, without affording the respondent any opportunity to cross examine or rebut such testimony, thereby violating the respondent's Sixth and Fourteenth Amendment rights. (Pages 41-45).

IV

The constitutional error in this case cannot be considered harmless, because the petitioner has not only failed to demonstrate beyond a reasonable doubt that the error was harmless, but once having conceded that the error may have interfered with respondent's right to a fair trial, the error cannot be declared harmless belond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967). (Pages 45-48).

Argument

I.

THE PROSECUTOR IN HIS CLOSING ARGUMENT VIOLATED VIRTUALLY ALL RECOGNIZED STANDARDS FOR PROPER ARGUMENT TO THE JURY, THE CUMULATIVE EFFECT OF WHICH VIOLATED RESPONDENT'S RIGHT TO A FAIR TRIAL.

Like a United States Attorney, a District Attorney "is the representative not of an ordinary party to a contro-

versy but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in criminal prosecutions is not that it shall win a case, but that justice shall be done." *Berger* v. *United States,* 295 U.S. 78, 88 (1935).

"The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." *American Bar Association Code of Professional Responsibility, Ethical Consideration* 7-13. See also, the predecessor of this provision, *ABA Canons of Professional Ethics, No. 5:* "The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done."

American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function, Part I, provides:

> "1.1
>
> (c) The duty of the prosecutor is to seek justice, not merely to convict.
>
> (d) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined in codes and canons of the legal profession, and in this report. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in ABA Standards, The Defense Function, section 1.3.
>
> (e) In this report the term "unprofessional conduct" denotes conduct which it is recommended be made subject to disciplinary sanctions. Where other terms are used, the standard is intended as a guide to honorable professional conduct and performance. These standards are intended as guides for the conduct of lawyers and as the basis for disciplinary ac-

tion, not as criteria for the judicial evaluation of prosecutorial misconduct to determine the validity of a conviction; they may or may not be relevant in such judicial evaluation of prosecutorial misconduct, depending upon all the circumstances."

Part V, 5.8, provides:

"(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.

(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict."

"The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the

other, of important governmental powers that are pledged to the accomplishment of one objective only, *that of impartial justice.* Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence not only in his profession, but in government and the very ideal of justice itself." *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1218 (1958). (Emphasis supplied.)

Throughout his closing argument the prosecutor made a number of statements which the Massachusetts Supreme Judicial Court held to be "clearly improper" *Commonwealth* v. *DeChristoforo,* 1971 Mass. Adv. Sh. 1707, 1711-1712, 277 N.E.2d 100, 105 (A. 154.) [14]

The prosecutor commenced his final argument to the jury in the following fashion:

> "Let me preface my argument by saying first of all I am aware that what I say, really is an argument because the *word 'argument' presupposes that I am prejudiced to the case that I represent, which, of course, I am. I think that the very nature of this system being adversary, pitting one side against the other, naturally makes you point to the things which you think support your particular position and to more or less ignore those things which I suppose detract from it."* (A. 119.) (Emphasis supplied.)

He then proceeded to identify his duties and obligations as a prosecutor with those of the jury. He argued:

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[14] It should be noted that all twelve of the Judges that have thus far reviewed this case have considered the prosecutor's remarks to be improper and five of the Judges have considered the remarks to be so improper as to violate the respondent's constitutional right to a fair trial.

> "And *we* have a sworn responsibility, it seems to me, to sit here in this courtroom now and say to *ourselves: We* are faced here *in our judgment* with one of the most savage killings that any jury could ever see anywhere under any circumstances."[15] (Emphasis supplied.) (A. 120, 121.)

It goes without saying that the killing of a human being, especially in the fashion that Lanzi was murdered, is a disgraceful, shocking and revolting act. However, for the prosecutor to describe Lanzi's murder as "(in) *our judgment . . . one of the most savage killings that any jury could ever see anywhere under any circumstances*" (A. 120, 121.), respondent believes cannot be ascribed to mere hyperbole or overzealous advocacy. (Emphasis supplied.)

The only purpose of the use of this "unnecessary villification" (A. 190) was to inflame the passions and prejudices of the jury. (However, no objection was made.)

The prosecutor then went on, conceding for the first time, that DeChristoforo had not actually fired any shots by saying to the jury: "*I think* the whole thrust of the government's case was that Gagliardi shot him three times here, and Oreto shot him in the back of the head, and our friend, DeChristoforo, had a cocked Rohm derringer ready to administer another shot if that became necessary." (A. 123.) (Emphasis supplied.)

In the light of the Commonwealth's particulars (See Statement of the Case, f.n.1) that "the defendant alone or in joint concert with others fired four bullets into the body of Joseph F. Lanzi," the defense was required to anticipate that the Commonwealth would introduce evidence

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[15] "The prosecutor is neither a witness, a mentor, 'nor a 13th juror' (the ultimate in absurdity, advanced by the prosecutor in Greenberg v. U. S., 1 Cir. 1960, 280 F.2d 472)." *U. S.* v. *Cotter*, 425 F.2d 450, 452 (1st Cir. 1970).

or argue from the evidence that DeChristoforo had actually fired one or more shots into the body of Joseph Lanzi. The defense, therefore, had no choice but to attempt to prove that it was Gagliardi and Oreto who had fired the four shots. As a consequence, a goodly portion of the three days actually spent in the introduction of evidence during the trial was devoted by the defense in attempting to establish that it was physically impossible according to the evidence, for DeChristoforo, seated where he was, to have fired any of the shots.

Petitioner argues that the failure of the respondent to ask for instructions from the trial judge with respect to the Judge's statement to the jury as to Gagliardi's plea of guilty was "consistent with respondent's counsel's prior attempts to introduce into evidence an exhibit showing that Oreto had already pleaded guilty to the murder of Lanzi and had been sentenced to life imprisonment. (Tr. 808, 810, 812, 819-822, 825-826.)

It was only because the Commonwealth had refused to concede that respondent fired no shots that respondent felt compelled to offer to introduce Oreto's record of conviction. In the light of petitioner's argument and only partial quote at page 7 of Petitioner's Brief, respondent is constrained to elaborate on what did occur.

After the Commonwealth had rested and prior to Gagliardi's plea of guilty, respondent's counsel, at a lobby conference with counsel for all parties present, on the afternoon before the case actually went to the jury, offered to introduce the original record of the court showing that Frank Oreto had been charged with and pleaded guilty to the murder of Joseph Lanzi. Following is the material colloquy that took place, only a portion of which is referred to in Petitioner's Brief at page 7:

"The Court: ... I will hear you Mr. Smith as to why this should be marked as an exhibit. I take it you are offering this to be offered as an exhibit.

"Mr. Smith: Yes, your Honor, it is a public record, it is a record of this court. It is an original record of this court. It establishes that Frank Oreto pleaded 'guilty' — was charged, rather, with the murder of Joseph Lanzi, that he pleaded 'guilty' to the murder of Joseph Lanzi; and I believe I have a right to show that someone else other than the defendant DeChristoforo killed Joseph Lanzi.

"The Court: Of course that would be true if it were different circumstances; but here, at least in the Particulars, the Commonwealth sets out clearly that these two defendants are being charged with the mur der, and it has been the posture of this case all the way through that these two defendants are being charged with the murder of Lanzi while either by themselves or while acting in concert with others; and to include Oreto who, truthfully, has been—in fact, I myself sentenced him to life imprisonment—

"Mr. Smith: But, the Particulars say that DeChristoforo personally did it, or in concert with others did it.

"The Court: Yes.

"Mr. Smith: Now, I have a right to show that he personally didn't do it.

"The Court: I think it's the posture of the case now that there has been no evidence from the Commonwealth as to who personally did it; and, quite obviously they are relying upon concerted action. And, that being the case, I don't see how it's material that this man was sentenced to life imprisonment.

"Mr. Smith: I have no objection if the District

Attorney will stand up and stipulate in front of the jury that he does not say that Benjamin DeChristoforo actually pulled the trigger of any gun that resulted in the death of Lanzi.

"The Court: I didn't say that he felt that way, or that the proof tended that way, I merely said, it's quite clear from the evidence, which has gone in now, there is no evidence as to which precise person or persons pulled the trigger—whether one, two or three, or no one. It's obvious, also, that two different caliber weapons—therefore, two different weapons were used.

What do you say about this, Mr. Balliro?[16]

"Mr. Smith: One more thought: I have a right to show my man didn't pull the trigger.

"The Court: I don't think that makes any difference. How does it prejudice your man if he was acting in concert with those who did; he is equally guilty.

"Mr. Smith: Because the law is different now. If I can have it determined that he didn't pull the trigger, then we are down to a different set of problem —a different problem, as to how the law applies to a so-called conspiracy or joint venture.

"The Court: If you are relying on the Stasiun case for that statement, why the Stasiun case is clearly distinguishable.

At any rate, let me hear from you, Mr. Balliro.....

"Mr. Irwin: Well, that is an entirely different thing. The fact of the matter was that Mr. Oreto elected to plead guilty in this court, and Your Honor, in your discretion, decided that he could plead to second-degree murder.

Now, there is nothing wrong with that or inconsistent with that. The fact of the matter is that if Mr. Oreto had been tried, he certainly could have been

[16] Joseph Balliro was the attorney representing Carmen Gagliardi.

tried on the basis of first-degree murder, with the possibility that he could have been convicted of it. Mr. Balliro cannot have it both ways. He talks about the Commonwealth having it both ways.

If that were the situation, if the legal argument was that these men could not be tried on first-degree murder, the time to make that argument was well in advance of this trial.

"The Court: I would have thought so.

"Mr. Smith: I offered it because I think I have a right to put it in, especially where there's been testimony that Oreto—

"The Court: As I understand your proposition, it is that someone else pleaded guilty to murder and that that, therefore, eliminates your client.

"Mr. Smith: It doesn't, ipso facto, eliminate him.

"The Court: Of course, it doesn't because the whole premise that the Commonwealth is advancing is that this murder was done by the three of them acting in concert.

"Mr. Smith: Well, if the Commonwealth will say so for the record so that the jury will know it, I will have no quarrel; but that isn't the Commonwealth's position. The Commonwealth's position is that either DeChristoforo personally shot him or, if they say he didn't, then he was acting in joint concert.

Now, they can't have that both ways.

"Mr. Irwin: *Of course we can.* (Emphasis supplied.)

"Mr. Smith: If I have an opportunity to prove that he didn't personally shoot him, at least I can eliminate that from the thinking of the jury.

And then the question of whether he was involved in a joint action is another question of fact for them to decide. But to throw it in the laps of a jury and

say: "Now it's up to you to decide one way or other, either he killed him himself personally or he was acting with a group"—

"The Court: Why wouldn't the solution to this be to announce to the jury that Oreto had pleaded guilty to murder, period?

"Mr. Smith: I am content with that...

"The Court: Well, I will think it over. I will take this matter under advisement.... I am not about to say that I am going to do this. For the record, I want to make that clear."[17] (Tr. 810-813, 819-821.)

From this colloquy, it was quite apparent that the Commonwealth was maintaining its position that it expected to argue to the jury that DeChristoforo fired a shot or shots into the body of Lanzi.

There would have been no need for the defense to have spent time of preparation, the time of the court and jury, and a substantial portion of closing argument in an attempt to convince the jury of a fact about which the Commonwealth knew prior to trial and ultimately conceded in closing argument, if the Commonwealth had conceded, as it later did, that it was Gagliardi and Oreto and not DeChristoforo who fired the shots. The defense trial strategy would have been materially altered. The unfairness of the Commonwealth's position is obvious. The respondent cannot understand how petitioner can equate respondent's efforts to offer Oreto's conviction, under the circumstances set forth, with the prosecutor's argument to the jury suggesting that the respondent had offered to plead guilty.

There was no evidence that DeChristoforo owned or had ever had possession of any gun, at any time, let alone a derringer. There was no evidence that DeChristoforo had

[17] The Judge did not adopt his own solution and did not "announce to the jury that Oreto had pleaded guilty to murder."

ever conspired with anyone to harm, let alone kill, Lanzi. There was evidence that they were "extremely close personal friends." (A. 87.)

Taking the Commonwealth's evidence at its best, the most that could be argued was that since Oreto used one gun and Gagliardi another, that where a third gun, namely the derringer, was found on the floor of the car near where DeChristoforo was seated that a jury might draw the inference that it was DeChristoforo's gun. Assuming *arguendo* the correctness of such an inference, it is a far cry from a nexus that DeChristoforo was ready or willing to use it. But the prosecutor *did not ask the jury* to draw such an inference. *He told them what his opinion was.* That opinion was not based upon any evidence introduced at the trial as to DeChristoforo's readiness to shoot Lanzi if it became necessary.

Had the prosecutor been a witness under oath, he could not have so testified and if *arguendo* such evidence would have been admissible, it would have been subjected to the test of cross-examination. Such an opinion coming from a government official was fortified by the prosecutor's apparent honesty in stating in the very same sentence (for the first time during trial) what he knew all along, that is, that it was Gagliardi and Oreto who had done the shooting.

The argument was not interrupted by an objection.

Immediately following this opinion testimony, the prosecutor raised the level of his personal opinion to that of personal knowledge. He stated to the jury: ". . . so at that point we have to conclude that Frank Oreto, I suppose, was carrying two guns, or Gagliardi was carrying two guns. *You know and I know that is a myth.*" (A. 124.) (Emphasis supplied.)

He continued: "The inference *I want you to draw is:* these people are clever enough — is that they don't have

guns that can ever be traced to them. *You know that and I know that.*" (A. 127.) (Emphasis supplied.)

During trial the respondent had introduced evidence that in the community where he had lived and at the State House where he had worked he had a reputation for honesty and for being a non-violent person. (A. 89-93.)

No evidence was introduced by the Commonwealth to rebut this.[18]

There was no evidence that the respondent had ever been the confidant or associate of gangsters, hoodlums, or racketeers. There was no evidence that he ever owned or had a gun that either could or could not be traced to him.

Notwithstanding this the prosecutor in effect stated that *he knew* that DeChristoforo had guns that could not be traced to him.

DeChristoforo was the only one before the court. It cannot be said that the prosecutor was referring only to Gagliardi and Oreto inasmuch as the prosecutor in his argument referred to all three guns. He made it very clear that in referring to "these people" who "don't have guns that can ever be traced to them" (A. 127) that *he knew* that DeChristoforo was one of "these people."

It is submitted that the prosecutor *did not know* that either Oreto or Gagliardi did not carry two guns. On the state of the evidence he could not *know* that DeChristoforo was one of "these people" who "don't have guns that can ever be traced to them."

What he really was testifying to was that *he knew* that neither Oreto nor Gagliardi was responsible for the der-

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[18] Under Massachusetts practice, once evidence of good character has been introduced, the Commonwealth has the right to rebut it. See *Commonwealth* v. *Maddocks*, 207 Masss. 152; *Wigmore on Evidence*, (3rd Ed.) 358.

ringer being in the back of the car and that DeChristoforo was the type of person who is clever enough to carry a gun or guns that can ever be traced to him.

Had any such evidence been proffered by a witness under oath, it would have been excluded. Here, however, the prosecutor represented that *he knew* this to be a fact. In short, he attempted to subvert the fact finding process and in effect testified that he had personal knowledge unknown to the jury.

This argument was not interrupted by any objection.

After testifying to the jury as to his *opinions* and *knowledge* of matters crucial to the case, the prosecutor continued to express his personal belief that the respondent was guilty of first degree murder *beyond any doubt.* (Emphasis supplied.)

He stated to the jury: "*I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way . . .*". (A. 130, 131.) (Emphasis supplied.)

No witness under oath would have been allowed to so testify.

As one who had already told the jury of his and its "*sworn responsibility*", (A. 121.) (emphasis supplied) the jury was faced with the extraneous and irrelevant issue as to whether the prosecutor was, indeed, "honest" and "sincere." And if he was, how could it question his assurance based on his "sworn responsibility" that he *believed* that "*there is no doubt in this case, none whatsoever.*" (A. 130, 131.) (Emphasis supplied.)

It follows that such a knowledge by the prosecutor, if true, would have to be based on evidence or facts known to the prosecutor but not known to the jury.

In addition to the foregoing inproper and prejudicial comments by the prosecutor and in the context of the jury just having been informed of Gagliardi's plea of guilty, the prosecutor then made his most egregious statement. He said: "*I don't know what they want you to do by way of a verdict. They said that they hoped that you find him not guilty. I quite frankly think that they hope you find his guilty of something a little less than first degree murder.*" (A. 129.) (Emphasis supplied.)

For the first time, respondent's counsel interrupted the argument and objected. Contrary to petitioner's statement (Brief for Petitioner, p. 11) the trial judge *did not* sustain the objection. The trial judge cut counsel off by saying, "No." (A. 129.)

It is respectfully submitted that counsel thereupon was confronted with a very limited choice of procedure. Having already had the experience of being cut off from pursuing an objection by a direction of "No" from the judge (Tr. 588), the options open to counsel were (a) engage in what might be regarded as a disruptive procedure and pursue the objection; or (b) pursue what has been generally regarded as the better and "more usual" practice to approach the bench at the conclusion of the summation and request an immediate instruction. See *Harris* v. *United States*, 402 F.2d 655, 657 (D.C. Cir. 1968).

It is important to note that the prosecutor commenced his argument immediately after 3:50 p.m. and concluded it shortly before 4:20 p.m. At most the time taken by the prosecutor in his closing argument was something under thirty minutes. Immediately after the prosecutor ended his argument, Judge Sullivan announced that he would instruct the jury "tomorrow morning" and at 4:20 p.m. ordered the closing of court. (Tr. 914, 915.)

Short of being disruptive, counsel had no choice but to wait until the next morning, at which time, before court reconvened, counsel for the respondent requested a lobby conference where he moved for a mistrial on the grounds that the prosecutor's argument to the jury "was so prejudicial and so unfair that it cannot be cured by instructions to the jury." (A. 132.) To the denial of that motion, respondent duly excepted (A. 134).

Thereupon, counsel for the respondent requested the trial judge to "forcefully and specifically instruct the jury that the statement made by Mr. Irwin (the prosecutor) in his closing argument to the effect that the defendant was not really seeking a not guilty . . . was an improper statement; that from the beginning of trial up to this point the defendant has maintained his complete innocence and in no way has indicated that he is willing or that he is seeking to have the jury find him guilty of a lesser offense." The trial judge stated "I will do so, and I suggest you write it out and I will file it with the papers, what you write out, and I will so instruct the jury." (A. 135.)

Counsel thereupon proceeded to write out and file the specific instructions set forth at A. 145.

The trial judge, however, *did not* "so instruct the jury." Instead, he instructed the jury as follows:

> "Now in his closing, the District Attorney, I noted, made a statement: 'I don't know what they want you to do by way of a verdict. They said they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder. There is no evidence of that whatsoever, of course, you are instructed to disregard that statement made by the District Attorney. Consider the case as though no such statement

was made.

"And the same instructions, of course, apply to any statements in argument which were made by Mr. Smith on behalf of the defendant, if any, you feel there be, statements which he made in his argument which were not supported by the evidence which you heard here during the trial of the cause. In short, the opening statement of counsel or the arguments of counsel at the conclusion of the case are not evidence for your consideration."[19] (A. 143, 144.)

There can be no serious question as to the impropriety of the statements made by the prosecutor in his closing argument. The statements were clearly in violation of every pertinent proscription in the *A.B.A. Standards relating to the Prosecution Function,* Part I, 1.1 (c) (d) (e), and Part V, 5.8; *A.B.A. Code of Professional Responsibility, Ethical Consideration* 7-13; and see *Professional Responsibility: Report of the Joint Conference,* 44 A.B.A.J. 1159, 1218 (1958); H. Drinker Legal Ethics 148 (1953).

The statements were in violation of the teachings of *Berger* v. *United States,* 295 U.S. 78, 88 (1935); *Viereck* v. *United States,* 318 U.S. 236, 247, 248 (1943); *New York Cent. R. Co.* v. *Johnson,* 279 U.S. 310 (1928); *Harris* v. *United States,* 402 F.2d 656 (D.C. Cir. 1968); *Hall* v. *United States,* 419 F.2d 580, 581, 584-588 (5th Cir. 1969); *United States* v. *Cotter,* 425 F.2d 450 (1 Cir. 1970); *Bowers* v. *Coiner,* 309 F. Supp. 1064, 1071, 1072 (S.D.W.Va. 1970); *Horner* v. *State of Florida,* 312 F. Supp. 1291, 1295-1296 (M.D. Fla. 1967), aff'd. 398 F.2d 880 (5th Cir. 1968);

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[19] The trial judge still did not "emphasize . . . that the argument had been grossly improper." *Commonwealth* v. *Cabot,* 241 Mass. 131, 150-151. To compound the error, he equated the prosecutor's highly improper argument with "statements . . . if any, you feel there be," made by the counsel for the defendant.

Patriarca v. *United States*, 402 F.2d 314, 321 (1 Cir. 1968), *cert. den.*; and *Greenberg* v. *United States*, 280 F.2d 472 (1 Cir. 1960).

If the instant case had been tried in the federal courts in the same fashion, it is submitted that the remarks of the prosecutor would have compelled reversal by an appellate court in the exercise of its supervisory powers. (See, Circuit Judge Campbell in his dissent, A.243.)

The statements of the prosecutor were not merely improper, but were so seriously prejudicial as to deny the respondent his Fourteenth Amendment right to a fair trial and to his right of confrontation. See *Frazier* v. *Cupp*, 394 U.S. 731, 736 (1939).

The Fourteenth Amendment guarantees that every citizen shall not be deprived of his "life or liberty, without due process of law."

The essence of due process of law is "fundamental fairness." E.g., *Chambers* v. *State of Mississippi*, 93 S.Ct. 1038 (1973); *Estes* v. *State of Texas*, 381 U.S. 532, 542, 543 (1965).

Some courts have indicated that the expression of individual belief by a prosecutor is permissible so long as the belief "is based solely on the evidence introduced and the jury is not led to believe that there is other evidence, known to the prosecutor but not introduced justifying that belief." See *Henderson* v. *United States*, 218 F.2d 14, 19 (6th Cir. 1955); *Thompson* v. *United States*, 272 F.2d 919 (5th Cir. 1959); *Schmidt* v. *United States*, 237 F.2d 542, 543 (8th Cir. 1956).

Other courts adhere to the absolute proscription against personal opinions contained in the Canon of Ethics "not only because counsel would then in effect be a witness not under oath or subject to cross examination, but because the false issue of credibility of counsel with the government

having the advantage would be injected." *Patriarca* v. *United States,* 402 F.2d 314, 321 (1st Cir. 1968), *cert. den.*; *United States* v. *Cotter,* 425 F.2d 450 (1st Cir. 1970); *Harris* v. *United States,* 402 F.2d 656 (D.C. Cir. 1968).

In those courts where expressions by the prosecutor as to his belief of the guilt of the accused have been held not to be prejudicial, there has been the caveat that the expression of belief is permissible so long as it was based solely on the evidence introduced and that the jury was not led to believe that there was other evidence personally known to the prosecutor not introduced in evidence justifying that belief. *Schmidt* v. *United States,* 237 F.2d 542, 543 (8th Cir. 1956).

In this case the prosecutor led the jury to believe that there was evidence known to the prosecutor but not introduced into evidence justifying his statements that:

(1) "We are faced here in our judgment with one of the most savage killings that any jury could ever see anywhere under any circumstances." (A. 121.)
(2) "DeChristoforo had a cocked Rohm derringer[19a] ready to administer another shot if that became necessary." (A. 123.)
(3) The prosecutor *knew* that it was a *myth* that Frank Oreto or Gagliardi was carrying two guns. (A. 124.)
(4) DeChristoforo was clever enough that he did not "have guns that can ever be traced to (him)." (A. 127.)
(5) "There is no doubt in this case, none whatsoever," and that the prosecutor "honestly and sincerely believe(d) that you people feel that way." (A. 130, 131.)

[19a] The evidence was that the derringer was only "half-cocked". To make it fire, its hammer would have to be "drawn fully to the rear" (A. 74, 75).

(6) The prosecutor did not "know what they (the respondent) want you to do by way of a verdict ... I quite frankly think that they hope you will find him guilty of something a little less than first degree murder." (A. 129.)

As this court has recognized "some remarks included in an opening or closing statement could be so prejudicial that a finding of error or even *constitutional error,* would be unavoidable." (Emphasis supplied.) *Frazier* v. *Cupp,* 394 U.S. 731, 736 (1969). The respondent submits that the cumulative effect of the prosecutorial misconduct which occurred here is "sufficient to constitute reversible constitutional error ... (which) would warrant federal habeas relief." *Frazier* v. *Cupp,* supra at 737; see also *Bowers* v. *Coiner,* 309 F. Supp. 1064 (S.D.W.Va. 1970); *Horner* v. *Florida,* 312 F. Supp. 1292 (M.D. Fla. 1967) aff'd 398 F.2d (5th Cir. 1968).

II.

THE PROSECUTOR IN HIS CLOSING ARGUMENT VIOLATED THE PRINCIPLES OF *Miller* v. *Pate,* 386 U.S. 1 (1967) BY REPRESENTING TO THE JURY THAT THE RESPONDENT WAS SEEKING TO HAVE THE JURY RETURN A VERDICT OF "SOMETHING A LITTLE LESS THAN FIRST DEGREE MURDER," A FACT WHICH HE KNEW NOT TO BE TRUE.

The respondent contends that the denial of his right to a fair trial guaranteed him by the Due Process Clause of the Fourteenth Amendment was compounded when the prosecutor, knowing that the fact had no basis in truth, represented to the jury that the respondent was seeking to be convicted of something "a little less than first degree murder" and as a consequence, had in effect admitted his guilt to something "a little less than first degree murder."

At the time that the trial judge announced to the jury that the co-defendant Gagliardi had pleaded guilty, the jury must have wondered to some extent why Gagliardi pleaded guilty and DeChristoforo did not. There were only two alternatives: either DeChristoforo had not sought to plead, or, he had sought to do so unsuccessfully. See *DeChristoforo* v. *Donnelly*, supra, (A. 239).

In this setting the prosecutor, with full knowledge that the respondent at no time had sought to plead guilty to any offense and had at all times insisted upon trial (A. 235), and with the background of prior prejudicial statements made by him, told the jury that "I quite frankly think that they (respondent and his counsel) hope you find him guilty of something a little less than first degree murder."

The inference that both Gagliardi and DeChristoforo had offered to plead to something "a little less than first degree murder" and that Gagliardi's plea had been accepted but that DeChristoforo's offer was rejected, seems inescapable.

In short, the inference was that DeChristoforo had conceded his guilt.

If there was any doubt about this inference, the prosecutor later in his argument eliminated it by saying: "I honestly and sincerely believe that there is no doubt in this case, none whatsoever. I honestly and sincerely believe that you people feel that way . . .". (A. 130, 131.) The cumulative effect of these and prior prejudicial remarks coupled with the jury's knowledge that the co-defendant had just pleaded guilty, invited the jury to conclude that the respondent had conceded his guilt and that this was within the personal knowledge of the prosecutor.

In the light of this, it can hardly be said, as the petitioner suggests, that "the improper remark causes only a possible improper inference with respect to a collateral issue. . .". (Brief for Petitioner, p. 22.)

The petitioner argues "... it makes no sense to infer that the prosecutor would accept a plea of guilty from a co-defendant who had shot the victim and refuse to accept a plea from another defendant who did not shoot the victim." (Petitioner's Brief, p. 24.)

Respondent submits that this argument is fallacious. In his argument the prosecutor indicated to the jury why a plea by DeChristoforo which, of course, was never made, was not acceptable, vis-a-vis that of Gagliardi or Oreto. He said:

> "(DeChristoforo), more than anybody else, I think, is more reprehensible than the other two combined, because this was the man who supposedly was the friend of Joseph Lanzi.
>
> "He is, in fact, a traitor to his friends. He is a murderer of his friends—pure and simple." (A. 131.)

At any event, even if the defendant had offered to plead guilty to a lesser offense, that fact would have been inadmissible. See *DeChristoforo* v. *Donnelly,* supra, and the cases collected at n. 6 (A. 241.)

Thus this Court has before it a situation where a state prosecutor, despite the fact that he knew it was untrue, strongly suggested to the jury that the defendant had offered to plead guilty to "something a little less than first degree murder."

In reaching the conclusion that DeChristoforo did not receive a fair trial, the Court of Appeals stated:

> "(f)or a prosecutor to convey, or even to permit, a false impression, invades the area of due process. *Miller* v. *Pate,* 1967, 386 U.S. 1; *Hamric* v. *Bailey,* 4 Cir., 1967, 386 F.2d 390." *DeChristoforo* v. *Donnelly,* supra, (A. 248.)

Petitioner, in his brief, attempts to distinguish the instant case from *Miller* and *Hamric* by arguing that: "There is absolutely nothing in the instant record to support the inference that the prosecutor deliberately or wilfully misrepresented what he knew not to be true." (Pet. Brief p. 22).

However, the record is to the contrary.[20] In the Court of Appeals the prosecution and defense stipulated that:

> "At no time did defendant seek to plead guilty to any offense; at no time did the Commonwealth seek to solicit or offer to accept a plea; and at all times defendant insisted upon a trial." (A. 235.)

As the Court of Appeals pointed out:

> "We may now ask how a prosecutor who had given contemplative thought to the matter could honestly believe that a defendant who had seen his co-defendant who had fired the shots allowed to plead to second degree, but made no attempt to plead himself, was risking first degree simply in the hope of getting "something a little less." Whether wisely or not, petitioner must have been hoping for something a lot less. Even if the prosecutor's statement here were to be charged, charitably, to thoughtlessness, in a first degree murder case there must be some duty on a prosecutor to be thoughtful. Moreover, good faith is not determinative. As the Court pointed out in *Brady* v. *Maryland*, 1963, 373 U.S. 83, at 87, (a suppression of favorable evidence case, which the Court construes pari passu with affirmative falsity),
>
> > '[T]he suppression by the prosecution of evidence favorable to an accused upon request vio-

[20] The prosecutor had in effect stated, without any basis in the record therefor, that he had knowledge that neither Oreto nor Gagliardi carried two guns and also that he had knowledge that respondent was the type of person who carried guns that could not be traced to him.

> lates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> 'The principle of *Mooney* v. *Holohan* [294 U.S. 103] is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.'

See also United States v. *Giglio*, 1972, 405 U.S. 150, 153-54." *DeChristoforo* v. *Donnelly*, 473 F.2d 1236, 1240 (A. 242, 243.)

Petitioner also attempts to distinguish the instant case from *Miller* and *Hamric* by arguing that the prosecutor's remarks, even if considered to be a misrepresentation, were not "such as to materially affect the fact-finding process." However, nothing could be further from the truth. After all, what remark could be more damaging to a defendant in a criminal trial than a prosecutor's remark falsely suggesting that the defendant had, in essence, conceded his guilt?

There can be little doubt that the prosecutor's remarks were, at least, "false" in the sense that they were misleading. Accordingly, the judgment of the Court of Appeals should be affirmed. *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Alcorta* v. *Texas*, 355 U.S. 28 (1957).

III.

THE PROSECUTOR WHO IN EFFECT TESTIFIED THAT THE RESPONDENT HAD OFFERED TO PLEAD TO "SOMETHING A LITTLE LESS THAN FIRST DEGREE MURDER," VIOLATED THE RESPONDENT'S CONSTITUTIONAL RIGHT OF CONFRONTATION.

Due process of law contemplates that an accused shall have "as a minimum, a right to examine witnesses against him." *In re Oliver*, 333 U.S. 257, 273 (1948.)

"A right of confrontation is 'implicit in the concept of ordered liberty' . . . reflected in the Due Process Clause of the Fourteenth Amendment, independent of the Sixth". *Pointer* v. *Texas,* 380 U.S. 400, 408 (1965) (Harlan, J., concurring).

This Court has held that the Confrontation Clause of the Sixth Amendment was "made obligatory on the States by the Fourteenth Amendment" and that the same standards must be applied "whether the right is denied in federal or state proceedings." *Pointer* v. *Texas,* 380 U.S. 400, 404, 407 (1965).

The Confrontation Clause of the Sixth Amendment requires that "(In) all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

In construing that clause this Court has held that "a primary interest secured by it is the right of cross-examination." *Douglas* v. *Alabama,* 380 U.S. 415, 418 (1965).

In *Pointer* v. *Texas,* 380 U.S. 400, 405, (1965) the Court said: "The right of cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's Constitutional goal."

The Confrontation Clause is not merely limited to those who give testimony from the witness stand but necessarily applies to all statements, declarations, and testimony which reach the jury and which may be adverse to the accused. *Parker* v. *Gladden,* 385 U.S. 363, (1966), and see *Barber* v. *Page,* 390 U.S. 719 (1968).

Consequently, the right of confrontation and cross-examination extends to all available persons whose declarations are used against the accused. *Smith* v. *Illinois,* 390 U.S. 129 (1968). Cf. *California* v. *Green,* 399 U.S. 149, 173, 186, 187 (1970), (Harlan, J., concurring), *Chambers* v. *State of Mississippi,* 93 S.Ct. 1038, 1045-1046 (1973).

In *Parker* v. *Gladden*, 385 U.S. 363, 364 (1966) this Court held that there was a denial of due process where a bailiff, an officer of the state, made statements to the jury that the defendant was guilty, as those statements were "not subjected to confrontation, cross-examination or other safeguards." Similarly, here, not only did the prosecutor express his personal belief in the defendant's guilt but he suggested that he had knowledge of matters unknown to the jury by strongly and falsely indicating to the jury that the defendant had offered to plead, "something which, by the great weight should not be told even when true." *DeChristoforo* v. *Donnelly*, 473 F.2d 1236, 1240 and cases cited at n.6 (A. 236, 241.)

In effect, the prosecutor in his closing argument not only testified against the defendant but knowingly testified falsely. This Court has recognized that because a prosecutor is a representative of a sovereignty his ". . . insinuations and especially assertions of personal knowledge are apt to carry much weight against the accused where they properly should carry none." *Berger* v. *U.S.*, 295 U.S. 78 88 (1935). Clearly, the false inferences to be drawn from the prosecutor's "testimony" were prejudicial and may well have had an effect upon the jury. See *Chapman* v. *State of California*, 386 U.S. 125 (1967); *Turner* v. *State of Louisiana*, 379 U.S. 466 (1965) citing *Tumey* v. *State of Ohio*, 273 U.S. 510, 532 (1927). If a prosecutor should not make any assertions of personal knowledge he certainly should not make any false insinuations and assertions. Cf. *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Miller* v. *Pate*, 386 U.S. 1 (1967); *Giglio* v. *United States*, 405 U.S. 150 (1972).

In *Douglas* v. *Alabama*, 380 U.S. 415, 419 (1965) this Court held that "since the [state] Solicitor was not a witness, the inferences from his [questions] . . . could not be tested by cross-examination" and that therefore the de-

fendant was denied "the right of cross-examination secured by the Confrontation Clause." Similarly, here the prosecutor's closing statements and the false inferences to be drawn therefrom were effectively insulated from any form of cross-examination or even rebuttal. As in *Douglas,* the prosecutor's statements "may well have been the equivalent in the jury's mind of testimony." Here, however, the respondent was doubly prejudiced by his inability to cross examine the prosecutor in that the impression deliberately conveyed by the prosecutor was utterly without foundation.

In this case the prosecutor's personal endorsement of the respondent's guilt was necessarily and substantially buttressed by the prosecutor's "frank" but false remarks which strongly implied that the defendant had admitted his guilt to the prosecutor by offering to plead. Just as *Douglas* was "a case of prosecutorial misconduct," (*California* v. *Green,* 399 U.S. 149, 187 n.20 (Harlan J. concurring)) the prosecutor's deliberately false "testimony" herein did even greater violence of the defendant's right to a fair trial. For the prosecutor to knowingly convey a false impression by means of his own statements, without affording the defendant an opportunity to cross-examine him or to rebut such testimony necessarily violated the defendant's Fourteenth Amendment right to due process. *Douglas* v. *Alabama,* 380 U.S. 415 (1965); *Miller* v. *Pate,* 386 U.S. 1 (1967); *Horner* v. *Florida,* 312 F. Supp. 1292 (M.D. Fla. 1967) aff'd. 398 F.2d 880; *Bowers* v. *Coiner,* 309 F. Supp. 1064; (S.D.W.Va. 1970) and see *Chambers* v. *Mississippi,* 93 S.Ct. 1038 (1973). As the Court of Appeals in effect held, (A. 243), not only was there substantial prosecutorial misconduct, but also there was "a deprivation of the right of confrontation . . . which . . . would warrant federal habeas relief." *Frazier* v. *Cupp,* 394 U.S.

731, 737 (1969). As the Commonwealth apparently has conceded that the prosecutor's argument was not only improper but in some sense prejudicial to the defendant, (Petitioner's Brief p. 2, 26) the judgment of the Court below must be affirmed.

IV.

The Constitutional Error In This Case Cannot Be Considered Harmless Within The Meaning Of *Chapman* v. *California*, 386 U.S. 18 (1967).

The respondent contends that the prosecutorial misconduct constituted constitutional error which cannot be considered harmless beyond a reasonable doubt.

In *Chapman* v. *California*, 386 U.S. 18 (1967), this Court held that "before a constitutional error can be held harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt" and that the burden of proving such error was harmless beyond a reasonable doubt is upon the "beneficiary" of such error. *Harrington* v. *California*, 395 U.S. 25 (1969).

Here, the Court of Appeals resolved the issue of harmless error thusly:

> "The question must be, would a jury, wondering whether petitioner was an active participant, or such small fry that the others were indifferent to his presence, be affected by a "frank" remark by one in a position to know what hopes petitioner had revealed to him? We think the answer is yes.
>
> If there can be any doubt about that, (and there were twelve jurors to ponder, and to point out the significance) this is a first degree murder case, the situa-

tion was created by a deliberate, and as we shall see, doubly unwarranted, act of the prosecutor, and we believe that fundamental fairness requires that the doubt be resolved in favor of petitioner." (A. 240)

Furthermore, the evidence against DeChristoforo was far from overwhelming. The Commonwealth having conceded that Gagliardi and Oreto fired the actual shots relied solely on circumstantial evidence to correct the respondent in a joint venture with them. (A. 150, 151). Evidence linking DeChristoforo to the crime of first degree murder consisted principally of the testimony of Officer Carr to the effect that DeChristoforo had told a false story. (A. 151, 18-20.) On cross-examination, however, evidence of prior inconsistent statements was introduced which would have warranted a jury in dis-believing that it was the respondent who had made the false statements. (A. 25-32) The only other direct evidence against the respondent was his presence in the automobile at the time when the officers stopped to question its occupants. To show consciousness of guilt, the prosecutor relied on evidence that the respondent, after leaving the scene, with the consent of the officers, was arrested some 18 months later at his grandmother's house, where he had been living continuously since the incident.[21] (A. 20; Tr. 803-806.)

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[21] In *Alberty* v. *United States*, 162 U.S. 499, 511 (1896) this Court observed:

> "(I)t is not universally true that a man who is conscious that he has done a wrong will pursue a certain course not in harmony with the conduct of a man who is conscious of having done an act which is innocent, right, and proper. Since it is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth but the righteous are as bold as a lion.' Innocent men sometimes

The prosecutor introduced into evidence a fully loaded derringer which was found on the floor of the automobile in front of where the respondent had been seated. However, other than his own unsworn statements in his closing argument, the prosecutor offered no evidence to directly link the gun to DeChristoforo or to the death of Lanzi.

Although the petitioner argues that the evidence against DeChristoforo was substantial, it was certainly no more substantial than the "circumstantial web of evidence" referred to in *Chapman* v. *State of California,* 386 U.S. 18, 25 (1967). Further, the petitioner has, *per force,* failed to establish "that the prosecutor's comments . . . did not contribute to (respondent's) convictions." *Chapman,* supra, at 26. Certainly his argument was "calculated to produce a . . . conviction." *Berger* v. *United States,* 295 U.S. 78, 88 (1935).

Moreover, neither the length of the prosecutor's argument, which lasted less than thirty minutes (Tr. 890, 915), and which was injected with improper remarks, nor the trial judge's instructions [22] render his comments

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> hesitate to confront a jury; not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves."

It should also be noted that the respondent sought to prove that his flight was based on his fear for his life; however the proffered evidence was excluded. (Tr. 803-806.)

[22] As Chief Justice Tauro, in his dissenting opinion (A. 162), pointed out: "In the circumstances of this case the instructions were far from sufficient to overcome the serious damage done." Moreover, "the naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Krulewitch* v. *United States,* 336 U.S. 440, 453 (1949). See also *Bruton* v. *United States,* 391 U.S. 123, 137 (1968) wherein this Court stated "we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross examination."

harmless as suggested by the petitioner (Pet. Br. 19).

The petitioner, in fact, admits that the prosecutor's closing arguments "may have interfered with the defendant's right to a fair trial" (Petitioner's Brief, p. 26). Nevertheless, the petitioner seems to argue that a state may subject an accused to an unfair trial and not violate his constitutional rights. This Court has consistently rejected any such proposition and has held that "a defendant is entitled to a fair trial. . ." *Bruton* v. *United States,* 391 U.S. 123, 135 (1968); *Brady* v. *Maryland,* 373 U.S. 83, 87 (1963); *Estes* v. *State of Texas,* 381 U.S. 532, 543 (1965) and cases cited therein; *Chambers* v. *State of Mississippi,* 93 S.Ct. 1038, 1045 (1973).

The Fourteenth Amendment concept of due process mandates that an accused be given a trial that is at least fundamentally fair. See *Benton* v. *Maryland,* 395 U.S. 784, 794, 795 (1969). "Every procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict the defendant or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law." *Tumey* v. *State of Ohio,* 273 U.S. 510, 532 (1927) (Emphasis added.) Accordingly, as the prosecutor's improper arguments "may have interfered with the defendant's right to a fair trial" or "had an effect on the outcome of the trial," they cannot be considered harmless error. *Napue* v. *Illinois,* 360 U.S. 264, 271-272 (1959). The respondent submits that "in these circumstances prejudice to the cause of the accused is so highly probable that . . . (one could not be) justified in assuming its nonexistence." *Berger* v. *United States,* 295 U.S. 78, 89 (1935).

Conclusion

As this Court has constantly maintained, it is the duty of the federal courts to make their own independent examination of the record when federal constitutional deprivations are alleged and to determine whether an accused has been given a fair trial.

See *Napue* v. *Illinois,* 360 U.S. 264 (1959) and *Shambers* v. *Mississippi,* 93 S. Ct. 1038 (1973). The respondent submits that the prosecutor's improper and prejudicial remarks "under the facts and circumstances of this case . . . deprived (the respondent) of a fair trial." *Chambers* v. *Mississippi,* supra. Accordingly for the reasons stated above, the respondent urges this Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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